

Northwestern Journal of International Law & Business

Volume 25

Issue 2 *Winter*

Winter 2005

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Recommended Citation

Sungjoon Cho, A Dual Catastrophe of Protectionism, 25 Nw. J. Int'l L. & Bus. 315 (2004-2005)

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A Dual Catastrophe of Protectionism

*Sungjoon Cho**

I. INTRODUCTION: SURREAL PHENOMENA

Suppose that a consortium of wealthy and powerful local industries, acting through lawmakers captured by these industries, managed to pass a statute, damaging to the larger public welfare, purely for a protectionist purpose. Suppose further that this statute victimizes exports from a small, poor country such as Vietnam, to a large, rich country such as the United States, because these imported products are cheaper and thus pose a competitive threat to rival domestic industries. Suppose also that courts in the importing country can do little to stop this chain of events. Rational individuals might find these events objectionable, if not inconceivable. Yet, no matter how irrational such events may appear, they constitute a very real problem in the United States. This Article argues that such parochial protectionism, which might seem to be the normal state of affairs to public choice theorists,¹ yields catastrophic effects in domestic constitutional as well as foreign policy terms. Moreover, these harmful effects extend not only to the United States but also to the rest of the world.

The post-Cold War détente between the United States and Vietnam led quite naturally to the lifting of a long-standing trade embargo and the subsequent launching of a historic bilateral trade agreement. In the course

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¹ “Public choice” theorists basically contend that politicians tend to serve their own interest, rather than broader public interest. See Leon Felkins, *Introduction to Public Choice Theory*, Nov. 8, 2001, at <http://www.magnolia.net/~leonf/sd/pub-choice.html>. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

of this “normalization” process,² the United States delivered its usual sermons on the value of free trade and advised Vietnam to take advantage of its natural endowments by harvesting seafood such as catfish.³ In fact, the United States’ counsel was judicious in view of the fertility of the Mekong River Delta, as well as the low cost of labor in Vietnam. In short, Vietnam enjoys a competitive advantage in aquaculture vis-à-vis its trading partners such as the United States, which naturally became a lucrative market for Vietnamese seafood exports.

When the bilateral trade agreement was signed, an influx of cheap Vietnamese catfish had begun to affect the domestic market share of southern catfish farmers, who were already not competitive due to natural disasters,⁴ lack of innovation,⁵ and, most critically, questionable policy guidance from the Department of Agriculture.⁶ Alarmed by their sinking profits, the southern catfish lobbies mobilized local politicians and launched a vigorous campaign against Vietnamese catfish.⁷ Initially, this reflexive and defensive response tended to revolve around reactionary and xenophobic arguments. Some propaganda warned that Vietnamese catfish have “grown up flapping around in Third World rivers and dining on whatever they can get their fins on.”⁸ Other lobbies alleged that the catfish might contain traces of Agent Orange from the Vietnamese War.⁹ Before long, however, the southern catfish lobbies realized that they needed to marshal more powerful political clout in order to achieve sufficient protection.

Fortunately for the southern seafood lobbies, and unfortunately for the rest of the nation, the machinery of American democracy proved quite adaptable to this task. In rapid and secretive fashion, the Congress, captured by the domestic catfish lobby, passed a flatly protectionist statute

² See Mark E. Manyin, *The Vietnam-U.S. Normalization Process*, CRS Issue Brief for Congress (Nov. 28, 2003), at <http://fpc.state.gov/documents/organization/27534.pdf>.

³ *Harvesting Poverty: The Great Catfish War*, N.Y. TIMES, July 22, 2003, at A18 [hereinafter *Harvesting Poverty*].

⁴ *Catfish Sector to Appeal U.S. Ruling*, VIET NAM NEWS (VNS), Aug. 14, 2003, at <http://vietnamnews.vnagency.com.vn/2003-08/13/Stories/17.htm> [hereinafter VNS, *Catfish*].

⁵ See Amalia R. Walton, *Catfish Wars: Vietnam's Fight for Free Trade in the U.S. International Court of Justice*, 13 PAC. RIM L. & POL'Y J. 471, 481-82 (2004).

⁶ See Elizabeth Becker, *Delta Farmers Want Copyright on Catfish*, N.Y. TIMES, Jan. 16, 2002, at A1.

⁷ Four southern states, Mississippi, Alabama, Arkansas, and Louisiana, produce around ninety six percent of U.S. catfish. See Kerrilee E. Kobbeman, *Hook, Line and Sink: How Congress Swallowed the Domestic Catfish Industry's Narrow Definition of This Ubiquitous Bottomfeeder*, 57 ARK. L. REV. 407, 411 (2004).

⁸ Press Release, U.S. Senator John McCain (Arizona), *Catfish Import Barrier Puts International Trade Agreements at Risk* (Dec. 18, 2001), at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=279 [hereinafter McCain].

⁹ *Harvesting Poverty*, *supra* note 3 (citing the former Senator Marion Berry).

“without debate or a vote.”¹⁰ This statute, lacking any scientific basis, legalized a monopoly over the use of the “catfish” label for domestic species, while banning such use for Vietnamese species. Moreover, the Commerce Department, in cooperation with the International Trade Commission, imposed heavy anti-dumping duties on Vietnamese catfish through a discriminatory non-market economy (NME) channel in a wholesale denial of Vietnam’s competitive advantage on seafood. This advantage is both *unacquired*, due to cheap labor and natural endowments befitting catfish harvest, and *acquired*, due to investment and innovation. The barrage against Vietnamese aquacultural industries also affected Vietnamese shrimp exports in similar ways as heavy antidumping duties were imposed on them as well.

This recent case of parochial protectionism aimed at Vietnam’s seafood exports has spawned pernicious consequences both domestically and internationally. Domestically, they are the latest empirical confirmation of Madisonian constitutional failure: the federal government was mobilized to benefit narrowly defined special interest groups, i.e., the southern catfish and shrimp lobbies, at the expense of an enormous welfare loss to nationally defined consumers and consuming industries.¹¹ Internationally, such a naked display of protectionism has alienated a new ally with which the United States had only recently signed a bilateral trade agreement in good faith. Considering the devastating impact on the Vietnamese economy inflicted by this type of protectionism, it should not be surprising that the recent U.S. trade policy against Vietnamese seafood has been characterized as “another Vietnamese War.”¹² Furthermore, from the broader perspective of the multilateral trading system represented by the World Trade Organization (WTO),¹³ this case has been referred to as the “purest manifestation of the hypocrisy of American trade policy.”¹⁴

Against the backdrop of this counter-productive outcome, this Article

¹⁰ McCain, *supra* note 8.

¹¹ American Seafood Distribution Association, *U.S. Broke Basa Commitment, VASEP Claims*, June 30, 2003, at <http://www.freetradeinseafood.org/news/article01.htm> [hereinafter *Basa Commitment*].

¹² “[M]ore than 20 years after their failure during the Vietnam war, they opt to launch a new war, as they declare, not to fight communism, but to combat Vietnamese tra and basa catfish.” Vietnamese Embassy in the United States, *Catfish Campaign against Vietnamese Fish* (Nov. 14, 2001), at <http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20011114174243> [hereinafter *Catfish Campaign*].

¹³ Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter *WTO Agreement*]; LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 6, 6-18, 33 I.L.M. 1140, 1144-53 (1994) [hereinafter *RESULTS OF THE URUGUAY ROUND*].

¹⁴ Paul Blustein, *Free Trade’s Muddy Waters*, WASH. POST, July 13, 2003, at F1 (quoting David J. Rothkopf, a Deputy Undersecretary of Commerce in the Clinton Administration).

argues that the type of parochial protectionism revealed in the recent Vietnamese seafood trade skirmishes does a grave disservice both to the United States and to the international community. Not only are such measures inefficient, they are also ineffective. The Article consists of four Parts. Part I documents in greater detail the trade dispute over Vietnamese catfish and shrimp exports to the U.S. market, with special attention to the question of how powerful southern lobbies prevailed over the broader economic interests of consuming industries and consumers. Part II explores the roles played by all three governmental branches—direct as well as indirect, actual as well as potential—in facilitating and enabling this distortion of free trade principles. Part III addresses the devastating effects, both internal and external, of this kind of protectionism; namely, that such measures result in a dual catastrophe in the sense that they serve parochial interests at enormous expense to the United States and the global economy (i.e., “constitutional failure”), while gravely damaging the reputation of the United States abroad (i.e., “foreign affairs failure”). To avoid similar catastrophes in the future, Part IV suggests that the United States must achieve greater legislative and procedural transparency both domestically and internationally, through a more inclusive policy-making process and a stronger commitment to multilateralism. Finally, the Article concludes by arguing that the United States must play a more authentic leadership role in the international community, rather than resorting to the dead-end of Exceptionalism.

II. A SEAFOOD NATION: THE VIETNAMESE CATFISH AND SHRIMP SAGA

Beginning in 1994 when the U.S. trade embargo against Vietnam was lifted and the seafood tariff reduced to zero, U.S. imports of Vietnamese catfish increased dramatically.¹⁵ Before long, these imports began to threaten southern catfish farmers’ long-standing monopoly in supplying catfish to domestic consumers.¹⁶ The reaction was full and fierce. Senator Marion Berry went so far as to allege that the Vietnamese catfish might contain Agent Orange sprayed during the Vietnamese War.¹⁷ This

¹⁵ See Adam S. Rix, *The Mekong River Basin: A Resource at the Cross-Roads of Sustainable Development*, 21 TEMP. ENVTL. L. & TECH. J. 103, 117 (2003) (observing continuing investment by the Vietnamese government in aquaculture).

¹⁶ See Ranja Sengupta, *U.S.-Vietnam Trade War over Seafood: Free-Trade Not So Free After All*, International Development Economics Associates, Sept. 4, 2003, available at http://www.networkideas.org/themes/trade/sep2003/tp04_Catfish.htm; MARK E. MANYIN, REPORT FOR CONGRESS: THE VIETNAM-U.S. BILATERAL TRADE AGREEMENT at 22, last updated on Sept. 9, 2002, available at <http://usembassy.state.gov/vietnam/www/btcrspt.pdf> (last visited on Nov. 13, 2004) [hereinafter Manyin, *Bilateral Trade Agreement*].

¹⁷ *Catfish Campaign*, *supra* note 12.

allegation provoked scathing criticism both inside and outside the United States. In fact, the safety of the Vietnamese catfish was confirmed and even praised by experts and U.S. government officials on several occasions.¹⁸ Undeterred, the Association of Catfish Farmers of America (CFA) lobbied congressmen from catfish raising states such as Mississippi and Louisiana in February 2001 in a futile attempt to persuade the United States Trade Representative (USTR) Robert Zoellick to support protective measures.¹⁹ In September 2001, senators from southern states attempted without success to block the passage of the Vietnam–U.S. Bilateral Trade Agreement over the catfish issue.²⁰

The southern catfish lobbies' first success came from the Congress nearly simultaneously with the launch of the bilateral trade agreement. Without any scientific justification, Congress passed a law which basically stipulated that *only* southern catfish could be marketed under the "catfish" label.²¹ Accordingly, Vietnamese catfish producers were forced to use other labels such as "tra" or "basa." Through this bizarre labeling scheme, the southern catfish lobbies sought to recover lost market share by essentially misleading consumers.

Even as Congress aided southern catfish farmers, the Executive branch launched an even more direct and destructive assault on Vietnamese catfish. On June 28, 2002, the CFA and other southern catfish industries filed a petition for an antidumping investigation with respect to Vietnamese catfish imports.²² On August 9, 2002, the International Trade Commission (ITC) made a preliminary determination that Vietnamese catfish imports materially injured domestic catfish industries. This was followed on January 24, 2003 by a preliminary determination by the Department of Commerce (DOC) that Vietnamese catfish producers/exporters were, in fact, guilty of dumping.²³ On June 16, 2003, in its final dumping determination, the DOC found dumping margins ranging from 36.84% to 63.88%. This finding was followed by the ITC's final injury determination on July 31, 2003.²⁴ The DOC then issued its antidumping order to the Customs Office on August 7, 2003 based on its calculation of weighted-average dumping margins existing for the period October 1, 2001 through

¹⁸ *Id.*; McCain, *supra* note 8; *Harvesting Poverty*, *supra* note 3.

¹⁹ *Catfish Campaign*, *supra* note 12.

²⁰ *Id.*; Kobbeman, *supra* note 7, at 415.

²¹ *See infra* Sec. II.A.

²² U.S. Department of Commerce, International Trade Administration (ITA), *Fact Sheet: Final Determination in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from Vietnam*, available at http://www.ita.doc.gov/media/FactSheet/0603/catfish_final_061703.html (last visited Jan. 5, 2005).

²³ *Id.*

²⁴ *Id.*

March 30, 2002.²⁵

Following the same pattern, an antidumping attack was also launched against Vietnamese shrimp imports. As in the case of catfish, the opening of the U.S. shrimp market to Vietnamese producers allowed American consumers to enjoy food that was once considered *haute cuisine* at affordable prices. Indeed, shrimp prices decreased from \$3 to \$1.85 per pound during the period between 2001 and 2003.²⁶ Meanwhile, U.S. shrimp imports rose sevenfold during the period between 1998 and 2002, and continue to rise.²⁷ In response, the U.S. Shrimp Trade Action Committee, acting on behalf of the U.S. Southern Shrimp Alliance (SSA), filed a demand for an anti-dumping investigation with the DOC on December 31, 2003.²⁸ On July 6, 2004, the DOC announced its preliminary determination with respect to antidumping duty investigations on imports of certain frozen and canned warm-water shrimp from China and Vietnam.²⁹ In its preliminary determination, the DOC slapped antidumping duties of up to 93.13% on shipments from Vietnam and up to 112.81% for China.³⁰ On or about November 24, 2004, the DOC will make its final determination after considering comments submitted by interested parties.³¹ If the DOC finds in its final determination that Vietnamese or Chinese exporters are guilty of dumping, the ITC will make its final injury determination on or about January 8, 2005,³² triggering the collection of antidumping duties by the Customs Office.³³

III. THREE GOVERNMENT BRANCHES' PROTECTIONIST INVOLVEMENT

A. The Congress

Following their futile attempt to sabotage the bilateral trade pact with

²⁵ *Id.*

²⁶ Consumers for World Trade, *U.S. Shrimp Smell Fishy* (Oct. 15, 2003), at <http://www.cwt.org/news/Articles/October%202003/Shrimp.htm> [hereinafter *Smell Fishy*].

²⁷ *Vietnam Protests U.S. Shrimp Dumping Duties*, REUTERS (July 7, 2004), available at <http://in.news.yahoo.com/040707/137/2ettb.html> [hereinafter *Vietnam Protests*].

²⁸ Tran Dinh Thanh Lam, *Trade-Vietnam: Shrimp Dumping Charge by U.S. Smells of Catfish*, INTER PRESS SERVICE NEWS AGENCY (Feb. 24, 2004), available at <http://www.ipsnews.net/interna.asp?idnews=22539> [hereinafter *Smells of Catfish*].

²⁹ ITA, *Fact Sheet: Preliminary Determinations in the Antidumping Duty Investigations on Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China and the Socialist Republic of Vietnam*, at http://www.ita.doc.gov/media/FactSheet/0704/shrimp_070604.html (last visited Jan. 5, 2005).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Vietnam, the southern catfish lobbies moved toward erecting an artificial trade barrier against Vietnamese catfish imports. Their basic strategy was to classify Vietnamese imports as something other than catfish, and thus discourage potential consumers from choosing imported Vietnamese catfish over domestic catfish products. There were no scientific or other reasons to justify such a move. The U.S. Food and Drug Administration (FDA) had originally permitted Vietnamese producers to use labels such as “basa catfish” on the ground that these labels performed a basic function of conveying to consumers certain important information on product characteristics.³⁴ The highly technical, taxonomical argument that Vietnamese catfish belong to a different *family* from their American counterpart did not alter the fact that the former is also a variety of catfish. The FDA, in collaboration with the National Marine Fisheries Services (NMFS), rejected this distinction.³⁵ Upon request by the FDA, Dr. Carl J. Ferraris, a catfish expert, testified that there was no justification, “historically or scientifically,” for limiting the term catfish to North American catfish.³⁶ The American Fisheries Society (AFS) also supported this position by noting that catfish represents more than 2,400 species of fishes in the “Siluriformes” *order* scattered all over the world, regardless of different *families*, which are a narrower taxonomical category than *order*.³⁷

Notwithstanding these findings, the southern catfish industries continued to lobby furiously against the inclusive “basa catfish” label permitted by the FDA. The gist of their self-serving argument was that the term “catfish,” as it relates to the marketing of catfish products, was not a taxonomical reference to a certain order of fish, but rather a commercial term reserved exclusively for “American” catfish produced in the United States.³⁸ To treat Vietnamese catfish as “catfish,” they alleged, would either be fraudulent³⁹ or tantamount to “economic adulteration.”⁴⁰ The southern catfish farmers claimed that it was Vietnamese producers who misled consumers by imitating the well-established brands of the former, such as “Cajun Delight” or “Delta Fresh,” and thus perpetuated the mistaken impression that such catfish originated in the Mississippi River

³⁴ See Kobbeman, *supra* note 7, at 412.

³⁵ See *id.* at 425.

³⁶ Becker, *supra* note 6.

³⁷ See Kobbeman, *supra* note 7, at 425-26; Joseph S. Nelson, et al., *When is a Catfish Not a Catfish – U.S. Legislation over a Name*, 27 FISHERIES 38, 39-40 (2002), available at <http://www.fisheries.org/html/fisheries/F0202/F0202p38-40.PDF>. The authors contend that the FDA’s authority to assign market names to fish should be protected and not trumped by legislation. *Id.* at 40.

³⁸ See Kobbeman, *supra* note 7, at 412.

³⁹ *Id.* at 415-16.

⁴⁰ *Id.* at 413 (quoting Senator Jeff Sessions from Alabama).

Delta when they were actually harvested in the Mekong River Delta.⁴¹

This argument does not constitute a valid justification for a protectionist labeling scheme. Indeed, if southern catfish farmers want a more exclusive label for their own catfish, they could use the term “channel catfish,” rather than mere “catfish,” to reflect the precise origin and species.⁴² Alternatively, the southern catfish farmers could adopt a voluntary labeling scheme, such as “American catfish” or “Mississippi Delta catfish.” If concerns about mischaracterization of imported catfish persisted, remedies could be sought through other domestic U.S. statutes, such as trademark⁴³ or consumer protection.⁴⁴

Disregarding all these reasonable alternatives, a handful of southern Congressmen have managed to pass a purely protectionist statute designed to grant domestic catfish producers a monopoly over the use of the “catfish” label.⁴⁵ The Farm Security and Rural Investment Act of 2002 (FSRIA) amended Section 403 of the Federal Food, Drug, and Cosmetic Act⁴⁶ to the effect that a food shall be deemed to be misbranded “[i]f it purports to be or is represented as catfish, unless it is fish classified within the family *Ictaluridae*.”⁴⁷ Furthermore, the Senate stealthily passed a separate bill prohibiting, with the same protectionist intent as the FSRIA, the FDA from spending money on the licensing of imports of catfish from families other than *Ictaluridae*. This measure effectively banned the importation of Vietnamese catfish from the *Pangasius* family as “catfish.”⁴⁸ This bizarre piece of legislation, which converts a generic appellation to a proper one, was only possible thanks to an eccentric legislative practice called a “rider.” A rider is a legislative provision which cannot pass on its own merits but which is nonetheless attached to a separate, unrelated important bill, such as an appropriations bill, and thus *rides* unchecked throughout the legislative

⁴¹ *Id.* at 422-23.

⁴² Nelson et al., *supra* note 37, at 39-40.

⁴³ See 15 U.S.C. § 1051 (2002).

⁴⁴ See Kobbeman, *supra* note 7, at 436-38 (arguing for the implementation of the “Country of Origin Labeling Act” to better inform consumers of origins of catfish they consume).

⁴⁵ See Michael Woods, *Food for Thought: The Biopiracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123, 142-43 (2002).

⁴⁶ 21 U.S.C.A. § 343(t) (2002).

⁴⁷ See Kobbeman, *supra* note 7, at 416; *Catfish Campaign*, *supra* note 12; Farm Security and Rural Investment Act of 2002 (FSRIA), Pub. L. No. 107-171, § 10806, 116 Stat. 134 (2002).

⁴⁸ *Catfish Campaign*, *supra* note 12; Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-176, 115 Stat. 704, § 755 (2001) (“None of the funds appropriated or otherwise made available by this Act to the Food and Drug Administration shall be used to allow admission of fish or fish products labeled wholly or in part as ‘catfish’ unless the products are taxonomically from the family *Ictaluridae*.”).

process.⁴⁹ This form of legislative abuse enables bad policies to become the law of the land because it can “force passage.”⁵⁰ Although a group of Senators tried unsuccessfully to sever the protectionist language from the underlying legislation, they did manage to shine a spotlight on the hypocrisy of United States trade policy in this area.⁵¹

Ironically, this amendment and subsequent new FDA guidelines on catfish labeling⁵² violate a basic tenet of the organic statute, the Federal Food, Drug, and Cosmetic Act, in that they effectively prevent the disclosure of critical information—the fact that basa or tra are still “catfish”—to consumers. In other words, the amendment fails to “properly label” foods, which is the very mission of the FDA.⁵³ Indeed, the misconception on the part of consumers that basa or tra are not substitutes for American catfish appears to be what the southern catfish industries actually intended.⁵⁴ The spread of such misinformation certainly contradicts the central purpose of U.S. consumer protection laws and regulations: providing consumers with better information with respect to potential purchases. It is noteworthy that even though many different families of sardines exist, these fish are all marketed in the United States under the name “sardines,” among other names, due to the general requirement that labels should not be misleading.⁵⁵

From an international trade law perspective, a labeling scheme that changes a generic category to a proper noun in order to protect domestic industries is a violation of the national treatment principle.⁵⁶ Article 2, Paragraph 3 of the U.S.–Vietnam Bilateral Trade Agreement stipulates that, “[e]ach Party shall accord to *products originating in the territory of the other Party treatment no less favorable than that accorded to like domestic products* in respect of all laws, regulations and other requirements *affecting*

⁴⁹ Project Vote Smart, *Government 101: How a Bill Becomes Law*, at http://www.vote-smart.org/resource_govt101_02.php#riders (last visited Aug. 15, 2004).

⁵⁰ Adam Smith, *Partisan ‘Riders’ Hold Good Legislation* (June 11, 1997), available at http://www.house.gov/apps/list/hearing/wa09_smith/970611op.html.

⁵¹ McCain, *supra* note 8; Kobbeman, *supra* note 7, at 419.

⁵² See U.S. Food and Drug Administration – Center for Food Safety & Applied Nutrition, *Letter to Various Seafood Trade Associations Regarding the Labeling of Catfish* (Feb. 28, 2003), available at <http://www.cfsan.fda.gov/~frf/slc2003.html>.

⁵³ 21 U.S.C. § 393(b)(2)(A) (2004).

⁵⁴ “The position of the politicians from the catfish producing states was that the Vietnamese were illegally appropriating the hard won and expensively cultivated cachet of the word ‘catfish’ to sell their imported, phony and subversive product as if it were as wholesome and patriotic as our stuff.” Russ John, *Catfish: A Southern Cultural Icon*, at <http://users.aristotle.net/~russjohn/commerce/ctfsh.html> (last visited Oct. 26, 2004).

⁵⁵ Panel Report, European Communities – Trade Description of Sardines, WT/DS231/R (May, 29 2002); WT/DS231/R/Corr.1 ¶ 5.60 (June 10, 2002).

⁵⁶ McCain, *supra* note 8.

their internal sale, offering for sale, purchase, transportation, distribution, storage or use.”⁵⁷

Here, under the catfish labeling scheme (*a law affecting their internal sale*), Vietnamese catfish (*products originating in the territory of the other Party*) cannot be marketed as “catfish” (*treatment no less favorable*) different from domestic catfish (*like domestic products*). In fact, this type of trade barrier has frequently been struck down in other cases. For instance, the European Court of Justice condemned Italy’s attempt to reserve, on an exclusive basis, the generic word for vinegar (“aceto” in Italian) for its traditional, wine-based domestic product. Accordingly, non wine-based foreign vinegars could not be marketed in Italy as “vinegar.” The ECJ concluded that the Italian measure violated the fundamental principle of free movement of goods within the European Community.⁵⁸

Apart from its own flaws, the foregoing legislative protectionism caused yet another complication. The catfish labeling statute put the U.S. government in an awkward position when it attempted to challenge a similar regulation enacted by the European Union. An E.U. Regulation banned the use of the term “sardines” as a generic name and permitted such use exclusively for those species found along the European coast.⁵⁹ This protectionist legislation monopolized, in a regulatory sense, the commercial label “sardines” for European sardines and discriminated, in a practical sense, against other species of sardines imported from Peru. Under pressure from the traditional Maine herring industry, the USTR originally planned to join Peru in its protest.⁶⁰ However, it was subsequently forced to abort that plan, to the consternation of American herring exporters, as a result of the catfish labeling legislation.⁶¹ The incoherence in this policy, and forced inattentiveness to other trading partners’ similar violations, are additional prices to be paid for contingent protection such as the catfish labeling.

⁵⁷ Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, art. 2, ¶ 3, *available at* <http://usembassy.state.gov/vietnam/www/hbta.html> (last visited Oct. 13, 2004) (emphasis added).

⁵⁸ Case 193/80, *Commission v. Italy*, 1981 E.C.R. 3019; Case 281/83, *Commission v. Italy*, 1985 E.C.R. 3397.

⁵⁹ Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, ¶¶ 3-4 (Sept. 26, 2002).

⁶⁰ Communication from the United States Requesting to Join Consultations on *European Communities – Trade Description of Sardines*, WT/DS231/4 (May 8, 2001).

⁶¹ Becker, *supra* note 6; McCain, *supra* note 8. *See also* Desa Philadelphia, *Catfish by Any Other Name*, TIME, Feb. 25, 2002, *available at* <http://www.time.com/time/global/feb2002/articles/catfish.html> (reporting that “Congress’s catfish vote forced the U.S. trade representative to drop opposition to a similar ban in Europe that allows only North Atlantic sardines to be sold as sardines”).

B. The Executive

1. Anti-Dumping Measures: Built-In Protectionism under the Guise of Fairness

To grapple with the implications of antidumping actions against Vietnamese catfish and shrimp exports, a basic examination of the concept of “dumping” is in order. Dumping is, in essence, an international mode of “price-discrimination” by which a producer exports its product cheaper than it is sold domestically, sometimes even below its production cost.⁶² Although this economically sensible and legitimate approach to profit maximization happens everywhere, as is often seen with factory outlets and airline tickets, the term “dumping” carries a pejorative connotation relative to a more value-neutral term like “price discrimination.” Price discrimination, at least domestically, is penalized only when it rises to the level of ‘predatory’ pricing, which unfairly suffocates competition in order to drive out competitors.⁶³ Nonetheless, major countries regularly condemn dumping as unfair and react by imposing heavy duties. In the absence of predatory intent on an international scale—which is a practical impossibility in most cases considering that exporters tend to be small businesses in developing countries⁶⁴—this phenomenon can hardly be explained without invoking protectionism. In fact, most antidumping measures are triggered by the existence of claims of injury to a narrow scope of domestic industries that produce “like products” in competition with foreign producers. In 1970, Kenneth Dam declared that “the concern with dumping is therefore a concern with the protection of domestic industry from international competition.”⁶⁵ More recently, Federal Reserve Board Chairman Alan Greenspan reaffirmed this position by stating that antidumping suits are “just simple guises for inhibiting competition” imposed in the name of “fair trade.”⁶⁶

Yet, these remedial actions are based on a self-righteous rhetoric of

⁶² See PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 141-45 (5th ed. 2000).

⁶³ See Sherman Act, 15 U.S.C. § 2 (2004); Robinson-Patman Act, 15 U.S.C. § 13(a) (2004).

⁶⁴ It seems absurd to apply the so-called “recoupment test,” which aims to determine whether predatory producers intend to raise prices to recoup the loss after they drive out rivals from the market via dumping, to small producers from poor countries. See Jorge Miranda, *Should Antidumping Laws Be Dumped?*, 13 *LAW & POL’Y INT’L BUS.* 255, 270 (1996).

⁶⁵ KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 168 (1970).

⁶⁶ Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 *ANTITRUST L.J.* 725, 725 (2000) (quoting Federal Reserve Board Chairman Alan Greenspan, Remarks Before the Dallas Ambassadors Forum, Dallas, Texas (Apr. 16, 1999)).

fairness that overwhelms rational notions of efficiency.⁶⁷ The alleged rationale of antidumping laws is the notion of a level playing field, under which producers are given identical conditions for production.⁶⁸ No matter how appealing this abstract argument may be to ordinary people, the truth is that trade makes sense because trading partners are not identical, but are different in many ways, including levels of development and natural endowment. These differences, in fact, are the sources of comparative advantage.⁶⁹ As long as trade is the goal, low prices should not be penalized unless they result from illegal activities, such as predatory pricing or copyright violation, or result in injury sufficiently serious as to trigger safeguard measures. Among economists, there is broad consensus that dumping is a benign phenomenon provided it is not accompanied by predatory intent.⁷⁰ This view is based on various economically sound reasons, including profit maximization and the launching of products into new markets. The sale of tickets at deeply discounted fares by airline companies is but one example of this benign form of dumping.

Returning to the Vietnamese catfish dispute, we see that Vietnamese farm-raised catfish are cheaper yet better quality than those caught in the Mississippi Delta. Natural endowments of cheap labor and superior technology in Vietnam provide that country with an advantage over those of the U.S., where production costs are much higher.⁷¹ Vietnam's Mekong Delta features perfect natural conditions for farming catfish. For one thing, the river's fast current is said to yield better-tasting catfish than those caught in the Mississippi Delta.⁷² Additionally, Vietnam is still a poor country where the average wage is very low and where labor tends to be family-driven. On top of these natural advantages, Vietnam also possesses an acquired advantage in the form of an innovative catfish breeding technology through which Vietnamese farmers are able to "bring the farm

⁶⁷ BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* xi (2003).

⁶⁸ On its official website, the Commerce Department, in the name of "Ensuring a Level Playing Field," instructs how to file antidumping claims. See <http://www.commerce.gov/field.html> (last visited Nov. 15, 2004). See also WTO Negotiating Group on Rules, *Communication from the United States: Basic Concepts and Principles of the Trade Remedy Rules*, TN/RL/W/27, at 4 (Oct. 22, 2002) [hereinafter *The U.S. Communication*].

⁶⁹ See Bernard M. Hoekman & Michael P. Leidy, *Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* 155, 160-65 (Robert M. Stern ed., 1993) [hereinafter *ANALYSIS AND OPTIONS*].

⁷⁰ See Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *ANALYSIS AND OPTIONS*, *supra* note 69, at 135; Raj Bhala, *Rethinking Antidumping Law*, 29 *GEO. WASH. J. INT'L L. & ECON.* 1, 11 (1995).

⁷¹ Shalmali Guttal, *The Mississippi-Mekong Catfish Wars*, at <http://www.peoplesfoodsovereignty.org/new/docs/doc9.htm> (last visited Nov. 15, 2004).

⁷² *Id.*

to the fish” by “raising their catfish fingerlings in cages submerged under houseboats.”⁷³ This new technology has enabled higher and better production. In sum, Vietnamese catfish are more competitive than Mississippi catfish because the former are not only cheaper, but also cleaner⁷⁴ and tastier⁷⁵ than the latter.

As with Vietnamese catfish, the cheaper price and better quality of Vietnamese shrimp are a natural consequence of cheap labor and an innovative breeding technology.⁷⁶ In particular, the Vietnamese farm shrimp in ponds, while their American counterparts catch shrimp in the sea.⁷⁷ In stark contrast to advanced Vietnamese aquaculture, southern shrimpers have stubbornly maintained their “Cajun traditions” and failed to modernize their outdated open-water shrimp harvest.⁷⁸ Accordingly, the Vietnamese shrimp harvest is much more efficient and stable.

Nevertheless, Vietnamese aquaculture was deprived of its competitive advantages by the protectionist measures described above. After “leveling the playing field” through the statute monopolizing the use of the “catfish” label,⁷⁹ the U.S. government actually tilted the playing field toward domestic catfish farmers by imposing antidumping duties on Vietnamese catfish. The imposition of antidumping duties in this case is deeply inequitable in view of the fact that it is the U.S. farmers, not their Vietnamese counterparts, who receive government subsidies.⁸⁰ Moreover, in August 2003 the U.S. Department of Agriculture announced a \$34 million compensation package to the domestic catfish industry based on findings that their economic woes were caused by “natural disasters” that preceded the alleged Vietnamese catfish dumping.⁸¹ This announcement indicates that the alleged injuries to domestic producers resulted from

⁷³ Walton, *supra* note 5, at 480.

⁷⁴ *Catfish Campaign*, *supra* note 12.

⁷⁵ Experts say that:

Vietnamese catfish – even if not called catfish anymore in the United States – is popular in North America not only because of its price, but more importantly, because of its taste. According to North American seafood importers, catfish from Vietnam has a special flavour and colouring, and is lean. The strong flow of the Mekong River makes the fish significantly fresher, cleaner and tastier than fish that are raised in stable still ponds.

Guttal, *supra* note 71.

⁷⁶ *Vietnam Protests*, *supra* note 27. See also Tran Dinh Thanh Lam, *U.S. Shrimp Dumping Charge Is Small Fish*, ASIA TIMES ON LINE (Feb. 26, 2004), at http://www.atimes.com/atimes/Southeast_Asia/FB26Ae01.html.

⁷⁷ *Id.*

⁷⁸ *Smell Fishy*, *supra* note 26.

⁷⁹ *Basa Commitment*, *supra* note 11.

⁸⁰ Guttal, *supra* note 71.

⁸¹ VNS, *Catfish*, *supra* note 4.

causes completely unrelated to Vietnamese trading practices. Hence, the antidumping duties imposed on Vietnamese exporters rested on a false foundation.

To better understand the antidumping statute's protectionist effects, one must take a close look at how the mechanism really works. Obviously, it is the antidumping statute itself that structures and executes these discriminatory remedies. Yet, if the antidumping statute is the main engine powering the protectionist machine, it is the total discretion bestowed upon and exercised by antidumping authorities—in particular, the DOC—that actually operates the machine. Any antidumping determination is rife with countless technicalities and formulae that sound innocuous, and even scientific, at first glance. They are handled with great deference in the name of professionalism. Yet, many of those technicalities and formulae, the “devilish details”⁸² so to speak, are based on pseudo-science. Indeed, it was argued above that antidumping measures have no viable rationale, save protectionism. Consequently, the antidumping statute creates a bureaucratic and self-justifying system that is highly vulnerable to protectionist capture. In short, the DOC “can come up with any dang number [it] want[s] to.”⁸³

Consider the following illustration of this arbitrary use of discretion. When imposing antidumping duties on Vietnamese catfish, the DOC departed from its traditional method of calculating normal value by considering, as a factor for producing frozen catfish fillets, the whole fish itself rather than primary factors such as labor, energy, feed, and fingerlings.⁸⁴ This aberrant practice, which the Court of International Trade had already declared “deviant” in a similar case,⁸⁵ resulted in inflated dumping margins. This result is not surprising when one considers that the use of an intermediary production factor, such as a whole fish, naturally results in a higher normal value than would be obtained through the use of primary production factors such as those underlying Vietnam's comparative advantages. The DOC's aberrant practice also raises certain procedural questions. Throughout the investigation, the DOC failed to notify the Vietnamese respondents of the new calculation method, despite the fact that

⁸² See LINDSEY & IKENSON, *supra* note 67.

⁸³ Blustein, *supra* note 14 (quoting Brink Lindsey of the Cato Institute).

⁸⁴ See Walton, *supra* note 5, at 487-88. See also *An Giang Agric. & Food Imp. Co. v. United States*, No. 03-00563 slip op. at 1 (Ct. Int'l Trade Oct. 8, 2004).

⁸⁵ See Walton, *supra* note 5, at 493-94. See also *Anshan Iron & Steel Co., Ltd. v. United States*, No. 02-00088 slip op. at 6 (Ct. Int'l Trade July 16, 2003), available at http://www.cit.uscourts.gov/slip_op/slip_op03/Slip-Op%2003-83.pdf. The Court ruled that, “[i]n valuing Plaintiffs' intermediate inputs, Commerce deviated from its well-established practice of assigning surrogate values to the factors of production for those intermediate inputs without providing an adequate explanation for such deviation.” *Id.*

it could reasonably be expected to be detrimental to their defense.⁸⁶ Unaware of the existence of the DOC's aberrant methodology, the Vietnamese respondents relied upon the traditional methodology "established by statute, case law, and practice."⁸⁷ Clearly, the DOC's failure of notification is at odds with general principles of administrative law such as fairness and due process.⁸⁸

Another dubious exercise of discretion by the DOC can also be found in the Vietnamese shrimp case. In this case, however, foreign shrimpers were incommoded by a taxing requirement that they calculate their U.S. market prices based on a fictional reverse-engineering of the original production process. On March 8, 2004, the DOC issued a rule requiring that shrimp exporters establish an imaginary "headless, shell-on" shrimp and adjust their actual prices and costs to this fictional creation, which may be labeled "Frankenshrimp."⁸⁹ Unfortunately, the DOC failed to provide any guidance as to how to do this or any justification as to why actual prices and costs should be disregarded.⁹⁰ To create a Frankenshrimp under the DOC's instructions, a Vietnamese shrimper would, theoretically, be required to replace the vein, shell and tail of every shrimp already processed, and then fabricate the cost most suitable to this fictional creature.⁹¹ The absurd "reverse-engineering" required under the DOC rule, which was allegedly devised by lawyers representing domestic shrimp industries, results in inflated dumping margins by keeping U.S. sales artificially low by subtracting *ex post* certain processing costs, such as those for de-veining, peeling the shell and removing the tail, that contribute to the actual price of shrimps sold in the United States.⁹² Yet, resistance to the DOC rule would be futile because the DOC would condemn such resistance by foreign producers or exporters as "lack of cooperation" and penalize it by imposing "punitively high" dumping margins.⁹³

2. Over-The-Top Protection: Non-Market Economy

The U.S. antidumping statute harms Vietnam further by discriminating against it vis-à-vis other antidumping targets. The rationale for this special discrimination is based on the assumption that data and information

⁸⁶ See Walton, *supra* note 5, at 495-96.

⁸⁷ *Id.* at 501.

⁸⁸ *Id.* at 496.

⁸⁹ Consuming Industries Trade Action Coalition, Shrimp Task Force, *Meet the Commerce Department's "Frankenshrimp,"* available at http://www.citac.info/shrimp/about/doc_frankenshrimp.htm (last visited Jan. 11, 2005).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

collected in non-market economies (NMEs) like Vietnam are unreliable because of the lack of a market mechanism. Accordingly, the U.S. government justifies the use of a “surrogate” market economy from which it derives whatever prices it deems to represent fair market values. As a practical result of this approach, the U.S. government ends up playing a God-like role in deciding the fate of foreign producers from NMEs. In the Vietnamese catfish case, for example, the DOC unilaterally concluded, without any consultation or reference to any relevant international organization such as the IMF, that:

[T]he level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value. The Vietnamese currency, the *dong*, is not fully convertible, with significant restrictions on its use, transfer, and exchange rate. Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalized for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatization of SOEs and the state-dominated banking sector has been slow, thereby excluding the private sector from access to resources and insulating the state sector from competition. Finally, private land ownership is not allowed and the government is not initiating a land privatization program.⁹⁴

First of all, it seems quite beside the point for the U.S. government to conduct such a comprehensive, yet still superficial, analysis on the general economic standing of Vietnam in the course of a case-specific antidumping investigation. After all, every antidumping case concerns a unique transaction that deserves an individualized treatment. Even under its own premise for the antidumping statute, the DOC would only have to focus on the narrow matter of whether the Vietnamese government, via unfair intervention, had distorted the price mechanism concerning production, distribution or exportation of frozen catfish fillets. Instead, the DOC resorted to the cumbersome and unreliable approach of examining a specific transaction through the prism of its own broad but uni-dimensional analysis of the current state of Vietnamese economic development. At a deeper level, the DOC must first provide a cogent rationale for the oversimplified dichotomy between market and non-market economies that underlies its basic approach.⁹⁵ Too many “unexamined assumptions,” including those

⁹⁴ U.S. DEPARTMENT OF COMMERCE, ANTIDUMPING DUTY INVESTIGATION OF CERTAIN FROZEN FISH FILLETS FROM THE SOCIALIST REPUBLIC OF VIETNAM - DETERMINATION OF MARKET ECONOMY STATUS, Public Document A-552-801 at 2, available at <http://www.ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-status-determination.pdf> (last visited Jan. 5, 2005) [hereinafter Market Economy Memorandum].

⁹⁵ William P. Alford, *When Is China Paraguay?: An Examination of the Application of*

related to the role of market and state in one economy, inform this dichotomy.⁹⁶ In addition, these assumptions tend to be one-sided and self-serving. Consider, for example, the many regulations and restrictions on the price mechanism in the titular market mechanism, such as rent control, anti-trust and quotas.⁹⁷ In fact, this unfavorable treatment of Vietnam in the name of NME contradicts the U.S. government's own assessment of the "fair" status of the Vietnamese market economy. The U.S. Embassy in Vietnam, which may be in the best position to evaluate the economic standing of Vietnam, concluded after its own rigorous assessment that Vietnamese catfish were not subsidized by the Vietnamese government.⁹⁸

The next problem is the replacement mechanism under which "Vietnam became Bangladesh."⁹⁹ After condemning as unreliable the entire Vietnamese price mechanism, the DOC disregarded actual data on home market prices and production costs in Vietnam and substituted for them fictional prices and costs borrowed from certain "surrogate" countries, such as Bangladesh, that the DOC selected solely on the questionable ground that such surrogate country shares the same stage as Vietnam in economic development.¹⁰⁰ Not surprisingly, this surrogate methodology inherently involves many pitfalls. For instance, the DOC elected as surrogate companies two Bangladeshi shrimp processing companies that did not actually raise their own shrimp.¹⁰¹ Replacing data from farming industries with those from processing industries that do not engage in farming activities seems highly unpersuasive. The dubious science employed in this surrogate enterprise was further compounded by the questionable "availability" of surrogate companies. A surrogate candidate is sub-optimal in most cases due to the lack of a perfect match in the real world. For example, the DOC relied on data from India with regard to production factors where Bangladeshi values were "not available" or

the Antidumping and Countervailing Duty Laws of the United States to China and Other "Non-Market Economy" Nations, 61 S. CAL. L. REV. 79, 84 (1987).

⁹⁶ *Id.*

⁹⁷ In fact, the DOC itself acknowledged the imperfectness of the designation of non-market economy by submitting that its evaluation "does not require that countries be judged against a theoretical model or a perfectly competitive *laissez-faire* economy" and that it nonetheless "must determine that the factors, taken together, indicate that reforms have reached a *threshold level* such that the country can be considered to have a functioning market economy." See Market Economy Memorandum, *supra* note 94 (emphasis added).

⁹⁸ See McCain, *supra* note 8.

⁹⁹ Cf. Alford, *supra* note 95, at 84 (trenchantly arguing that "China became Paraguay").

¹⁰⁰ See Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 C.F.R. 4986, 4990-95 (2003).

¹⁰¹ *Id.* at 4992.

“impracticable.”¹⁰² Thus, Vietnam becomes India in such a case. This highly unnatural, arbitrary process tends to seriously undermine the credibility of the DOC’s final determinations.

The profound executive discretion enshrined in antidumping procedures reaches its climax in the final stage of duty rate calculation. In the case of market-economies, individual dumping margins are automatically assigned to exporters.¹⁰³ However, in the case of NMEs, each exporter must pass a “separate rate” test to receive its own, individual dumping margins.¹⁰⁴ Those exporters that do not pass this test receive the “countrywide” dumping margin, which is normally higher than the separate rates.¹⁰⁵ Accordingly, in the Vietnamese catfish case the DOC assigned to eleven individual producer/exporters individual dumping margins ranging from 36.84% to 52.90% on the grounds that they were qualified for the application of separate rates.¹⁰⁶ The countrywide rate for Vietnam was 63.88% and was applied to producer/exporters who failed either to respond to the DOC’s questionnaires or to pass the separate rate test.¹⁰⁷

3. A Booster for Protectionism: The Byrd Amendment

In yet another bold protectionist move, the U.S. Congress in 2000 passed a statute that handsomely rewarded the petitioners in the antidumping suits. The “United States Continued Dumping and Subsidy Offset Act (CDSOA) of 2000,”¹⁰⁸ dubbed the “Byrd Amendment” after the Act’s patron, Senator Robert Byrd, requires the U.S. Customs Service to distribute the antidumping duties it collects to certain antidumping petitioners on an annual basis.¹⁰⁹ This monetary reward grants an extra boon to domestic producers above and beyond the protection achieved through antidumping suits. Needless to say, this statute has resulted in domestic producers filing several new antidumping suits that they would not have launched without the additional incentive.¹¹⁰ Interestingly, the

¹⁰² *Id.*

¹⁰³ U.S. Department of Commerce, Import Administration, *Antidumping Manual*, Ch. 8, at 90, (Jan. 22, 1997), available at <http://www.ia.ita.doc.gov/admanual/>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 37116, 37121 (June 23, 2003).

¹⁰⁷ *Id.*

¹⁰⁸ The United States Continued Dumping and Subsidy Offset Act (Byrd Amendment), Pub. L. 106-387, 19 U.S.C. § 1675(c) (2000).

¹⁰⁹ Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, ¶ 12 (Jan. 16, 2003), [hereinafter *Byrd Amendment*, Appellate Body Report].

¹¹⁰ Kenneth J. Pierce & Matthew R. Nicely, *Case Studies: Catfish and Shrimp*

Byrd Amendment operates in a manner that resembles class action suits;¹¹¹ it provides the “lure of big cash awards” as well as “attorney contingency arrangements.”¹¹² The SSA, the main petitioner in the Vietnamese shrimp anti-dumping suit, sent letters to domestic shrimpers stating that “you must register to participate in any monetary benefits that may accrue through duties levied on imported shrimp if the domestic industry prevails.”¹¹³ During the 2001-2003 period, total disbursements to petitioners under the Byrd Amendment amounted to \$0.8 billion.¹¹⁴

In fact, the Byrd Amendment ran afoul of international trade rules. More than ten WTO Members, including the EC, Canada, Japan, India and Brazil, filed a collective suit against the United States over the statute before the WTO panel.¹¹⁵ In the course of adjudication, the United States attempted to distinguish the case from the previous U.S.-1916 Act (2002) case that featured a similar fact pattern. In its defense, the United States argued that the CDSOA, unlike the 1916 Act which imposed civil actions and criminal proceedings on alleged dumpers, did not violate Article 18.1 of the WTO Antidumping Agreement because the CDSOA is not the type of “specific” action prohibited under Article 18.1 in order to prevent an over-blown use of antidumping measures for protectionist purposes.¹¹⁶ The Appellate Body (AB) rather summarily rejected this defense by finding that dumping is, in fact, a constituent element of the CDSOA, at least by implication.¹¹⁷ Notwithstanding the AB’s ruling, the United States has not repealed the Byrd Amendment.¹¹⁸ Despite the recent WTO authorization to retaliate against the U.S. for its non-compliance with WTO rules in this matter,¹¹⁹ Congress’ continued support for the Byrd Amendment suggests

Antidumping Cases, Conference Paper presented at the NCIEC WTO Conference, at 1-5 (Georgetown University Law Center, Mar. 11, 2004).

¹¹¹ Regarding certain negative aspects of class action suits, see e.g., *Developments – The Paths of Civil Litigation*, 113 HARV. L. REV. 1827, 1836 (2000); Janet Cooper Alexander, *Do the Merits Matter?: A Study of Settlement in Securities Class Action*, 43 STAN. L. REV. 497, 581-82 (1991).

¹¹² Pierce & Nicely, *supra* note 110, at 5.

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 4; U.S. Customs and Border Protection, *The Continued Dumping and Subsidy Offset Act of 2000*, available at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/ (last visited Nov. 25, 2004).

¹¹⁵ *Byrd Amendment*, Appellate Body Report, *supra* note 109, ¶¶ 3-4.

¹¹⁶ *Id.* ¶ 243.

¹¹⁷ *Id.* ¶ 244.

¹¹⁸ See Status Report by the United States (Addendum), United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/16/Add.6, WT/DS234/24/Add.6, (July 6, 2004).

¹¹⁹ WTO, *Arbitrator Issues Awards on “Byrd Amendment,”* Aug. 31, 2004, available at http://www.wto.org/english/news_e/news04_e/news04_e.htm.

that it will not be repealed in the near future,¹²⁰ despite the Congressional Budget Office's negative evaluation that the law leads to inefficient use of allocation within the U.S. economy by subsidizing certain firms at the expense of others and stimulating unnecessary litigations.¹²¹

C. The Judiciary

Although the Court plays a rather indirect role in this protectionist enterprise vis-à-vis the other governmental branches, its practical contribution to the protectionist mission, particularly in terms of antidumping measures, is as significant as that of the Executive. Courts have performed a minimal level of judicial review over antidumping measures rendered by the DOC and the ITC in the spirit of the *Chevron* doctrine.¹²² The *Chevron* doctrine (prong two) mandates that, except for situations where the mandate of Congress is explicit and clear (prong one), a reviewing court should respect professional decisions by an administrative agency, such as the DOC, as long as such agency's decision is not arbitrary or unreasonable.¹²³ Additionally, hearings conducted during the antidumping investigation are often beyond the reach of the Administrative Procedure Act.¹²⁴ Considering that the Executive is directly responsible for conducting the analysis and handling the computations and other minutia associated with administering and enforcing the antidumping statute, it should be no surprise that a judicial *carte blanche* would be extended to such "devilish details."¹²⁵

The phenomenon of minimal judicial review on antidumping measures is consistent in all levels of judicial scrutiny. The Court of International Trade (CIT), a trial court reviewing final determinations by the DOC and the ITC, in fact functions as an appellate tribunal and is "extremely

¹²⁰ See *Byrd-Brained*, THE ECONOMIST, Sep. 4, 2004, at 69; Dan Ikenson, "Byrdening" Relations: U.S. Trade Policies Continue to Flout the Rules, Free Trade Bulletin No. 5 (Jan. 13, 2004), available at <http://www.freetrade.org/pubs/FTBs/FTB-005.html> (depicting trade remedy laws, such as the Byrd Amendment, as the "sacred cow" of the U.S. trade policy).

¹²¹ Letter from Congressional Budget Office (CBO) to Congressman Bill Thomas: Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000, available at <http://www.cbo.gov/showdoc.cfm?index=5130&sequence=0> (last visited Nov. 26, 2004) [hereinafter CBO Letter].

¹²² See Haldane Robert Mayer, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit*, 52 AM. UNIV. L. REV. 761, 762 (2003).

¹²³ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). See Elizabeth C. Seastrum, *Chevron Deference and the Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Determinations?*, 13 FED. CIR. B.J. 229, 230 (2003/2004).

¹²⁴ Walton, *supra* note 5, at 486; 19 C.F.R. § 351.310(d)(2).

¹²⁵ See generally LINDSEY & IKENSON, *supra* note 67.

deferential.”¹²⁶ The CIT’s standard of review carries less weight than the evidence when it reviews the DOC’s determinations.¹²⁷ Likewise, the Court of Appeals for the Federal Circuit does not, at present, seem to be an ideal appellate forum for foreign producers in the antidumping litigation. Apart from its chronic shortage of judges, which is often redressed by means of visiting district judges,¹²⁸ the relatively narrow scope of its jurisdiction, which is limited to “complex and technical” determinations by the DOC,¹²⁹ tends to result in the extension of a broad range of deference to the DOC. In fact, the Federal Circuit considers the DOC as the “master” of the antidumping statute.¹³⁰ The Federal Circuit endorsed the *Chevron* deference in the antidumping case even regardless of any international trade agreement, such as GATT.¹³¹ To make matters worse, its current standard of review, as demonstrated in its decision on trade remedies, is inconsistent.¹³² Finally, the Supreme Court rarely grants *certiorari* to antidumping cases appealed from the Federal Circuit, partly because “no circuit split controversy exists.”¹³³

In sum, in the case of antidumping measures, courts cannot provide recourse for antidumping victims on account of the structural factors outlined above, including the great discretion bestowed on the Executive in antidumping investigations and determinations. Reluctant to second-guess the exercise of such discretion, the judiciary tends to enshrine the initial protectionist impact rendered by the Executive.

¹²⁶ 19 U.S.C. § 1516a (2000); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 149 (1997); *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 705 (1980). *See also* Walton, *supra* note 5, at 489; James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After Ten Years - A Personal View*, 14 FORDHAM INT’L L.J. 10, 25 (1991).

¹²⁷ Walton, *supra* note 5, at 489-90; *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

¹²⁸ Mayer, *supra* note 122, at 762.

¹²⁹ *See* Bernd G. Janzen, *International Trade Decisions of the Federal Circuit: Three Years of Rigorous Review*, 52 AM. UNIV. L. REV. 1027, 1130 (2003).

¹³⁰ *Id.* at 1078; *Daewoo Elecs. Co., Ltd. v. Int’l Union of Elec., Electrical, Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993). *See also* Seastrum, *supra* note 123, at 230.

¹³¹ *See* Seastrum, *supra* note 123, at 237-38.

¹³² Herbert C. Shelley et al., *The Standard of Review Applied by the U.S. Court of Appeals for the Federal Circuit in International Trade and Customs Case*, 45 AM. U. L. REV. 1749, 1781-82 (1996).

¹³³ Walton, *supra* note 5, at 490; Toupin, *supra* note 126, at 19.

IV. THE DUAL CATASTROPHE OF PROTECTIONISM: NATIONAL AND INTERNATIONAL

A. National (Federal) Catastrophe

It is not difficult to measure the level of damage that this seafood protection causes to consumers and to the U.S. economy in general. Considering that one out of every three seafood restaurants in the United States serves catfish, the targeted protectionism mentioned above and resultant price increase obviously hurts catfish importers, processors, wholesalers, retailers and related employees, to say nothing of consumers, who pay a sizable "protection tax,"¹³⁴ for no other reason than to serve the parochial interests of southern catfish farmers.¹³⁵ Similarly, almost ninety percent of all domestic shrimp consumption is supplied by imports.¹³⁶ Shrimp imports have created about 100,000 jobs in the shrimp processing sector and an additional \$2 billion annually to retailers and restaurants in the United States.¹³⁷ To save one job in the domestic shrimp production sector, twenty jobs in shrimp-consuming industries such as processing and distribution may need to be sacrificed.¹³⁸ In sum, the United States cannot, and should not, contravene the law of economic gravity that has converted the shrimp, once a luxury item, into the most popular, yet affordable, seafood in the country.¹³⁹ The prosperity brought by open trade policies is now being jeopardized.¹⁴⁰

Further, gross protectionism of this sort can be interpreted as a form of "constitutional failure"¹⁴¹ in that it violates basic tenets on which the U.S. Constitution is predicated: anti-parochialism and an integrated federal marketplace. Local protectionism not only sacrifices the welfare of the many for the narrow benefit of a few, but if left unchecked, it spreads its pathogen more broadly and infects other parts of the whole. This disease threatened nation building under the Articles of Confederation. Economic balkanization was precipitated by mutually destructive tariff wars among

¹³⁴ See Consumers for World Trade, *Protectionism in America: Watch Your Wallet* (Nov. 1, 2003), available at <http://www.cwt.org/learn/CWT%20Protection%20Tax%20Study.pdf>.

¹³⁵ McCain, *supra* note 8.

¹³⁶ See Tran Dinh Thanh Lam, *supra* note 76.

¹³⁷ *Id.*

¹³⁸ Consuming Industries Trade Action Coalition (CITAC), *Facts about the Shrimp Dumping Case*, available at http://www.citac.info/shrimp/about/fact_sheet.htm (last visited Nov. 29, 2004) [hereinafter CITAC, *Facts*].

¹³⁹ *Shrimp and Mischief*, N.Y. TIMES, Jul. 21, 2004; *Vietnam Protests*, *supra* note 27.

¹⁴⁰ McCain, *supra* note 8.

¹⁴¹ ROBERT E. HUDEC, ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 133 (1999) (quoting Jan Tumlir). See generally JAN TUMLIR, PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES (1985).

the thirteen Confederates that were in thrall to their respective local interests.¹⁴² This sobering historical lesson corroborates the far-reaching interpretation of the Commerce Clause¹⁴³ articulated by James Madison and Chief Justice John Marshall, as well as the ingenious invention of the “Dormant Commerce Clause,” which allowed the invalidation of protectionist state taxes and regulations.¹⁴⁴

The antidumping mechanism provides a clear example of how protectionism can be a constitutional failure. Although it is a federal rather than a state initiative, antidumping protection can be as harmful as conventional local protectionism as long as it serves and channels parochial interests at the expense of the federal economy. Yet, apart from a direct effect on protection tax, which has been discussed above, the antidumping mechanism further distorts a federal market system by steering scant domestic resources, such as labor and capital, “from higher-value to lower-value uses.”¹⁴⁵ The recent Byrd Amendment has fueled such inefficient resource allocation by feeding moribund domestic industries with the very antidumping duties collected as a result of their own petitions. It has also contributed to enormous transaction costs incurred by sparking a flurry of lobbying and lawyering.¹⁴⁶ Some have argued that the Byrd Amendment might even resurrect deceased industries which would resume production in order to receive the disbursement.¹⁴⁷ To make matters worse, the antidumping mechanism also encourages cartelization of certain products because its persecution of low-priced imports generates the same effect as price fixing between foreign and domestic producers.¹⁴⁸ Foreign producers are forced to join this cartelization either by voluntarily raising their export prices to a certain comfort price level comparable to domestic industries or by involuntarily being subject to antidumping duties tantamount to alleged dumping margins. Invariably, their eventual U.S. sale prices will either be fixed or remedied. Such anti-trust phenomenon runs afoul of the U.S. economic constitutionalism advocating free market and free competition.

Finally, all these results tend to be multiplied by a reasonably speculated contagion effect of antidumping suits. Encouraged by the Vietnamese catfish and shrimp sagas, other U.S. industries may wage their own bets and seek their own protection from foreign competition through

¹⁴² See WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 67-68 (8th ed., 1996).

¹⁴³ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1044-46 (3d ed., Vol. I., 2000).

¹⁴⁴ See *id.* at 1030. See also *Dennis v. Higgins*, 498 U.S. 439, 446 (1991).

¹⁴⁵ See CBO Letter, *supra* note 121.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Richard J. Pierce Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L. J. 725 (2000).

antidumping suits. The recent Byrd Amendment warrants such speculation.

Even if the antidumping statute is unobjectionable, *arguendo*, on constitutional grounds, this type of administrative protection is ultimately ineffective because it cannot completely block the inflow of competition from multiple sources. Blocking Vietnamese shrimp cannot be translated into protecting the southern shrimp farmers when shrimp from the Gulf of Mexico and South Atlantic are filling the gap.¹⁴⁹ The recent surge in Chinese catfish imports to the U.S. market lends added credibility to this forecast.¹⁵⁰ In addition, U.S. domestic shrimpers also targeted shrimp imports from trading partners other than Vietnam, such as Brazil, China, Ecuador, India, and especially Thailand.¹⁵¹ Thailand is the chief provider of both frozen and prepared shrimp products to the United States.¹⁵² If those countries—which, unlike Vietnam, are all WTO Members—were to challenge the U.S. antidumping measures against their shrimp exports pursuant to the WTO dispute resolution procedure and win, the United States would have to withdraw its antidumping measures unless it chose to tolerate retaliation. Under this circumstance, the United States would also have to treat Vietnam in the same way, due to its Most-Favored Nation obligation under the bilateral trade agreement with Vietnam. This outcome only strengthens the case against the antidumping regime.

B. International Catastrophe

The all-out protection against Vietnamese catfish and shrimp has cost the United States dearly with respect to foreign policy, particularly with Vietnam. The recent skirmishes over Vietnamese catfish and shrimp make a mockery of U.S. diplomatic efforts toward normalization, ranging from the détente to the signing of a bilateral trade agreement. At the same time, the United States' protectionist actions have caused severe damage to their reputation as an advocate of free trade. In the process, they have only strengthened the claims of critics of American Exceptionalism.

While the catfish war may be unfamiliar to people in the United States, it has been front-page news in Vietnam.¹⁵³ Catfish are crucial sources of income not only for farmers in the Mekong Delta area, but also for people employed in the processing and export sectors in the neighboring provinces.¹⁵⁴ U.S. protectionism deprives Vietnam of a ladder to

¹⁴⁹ See Tran Dinh Thanh Lam, *supra* note 76.

¹⁵⁰ See Kobbeman, *supra* note 7, at 431.

¹⁵¹ Tran Dinh Thanh Lam, *supra* note 76.

¹⁵² David J. Harvey, *Imports Provide Competition for Domestic Production, AQUACULTURE OUTLOOK* (USDA LDP-AQS-14), Oct. 10, 2004, at 7, available at <http://www.ers.usda.gov/publications/so/view.asp?f=livestock/ldp-aqs/2001/>.

¹⁵³ *Harvesting Poverty*, *supra* note 3.

¹⁵⁴ Guttal, *supra* note 71; *Fighting Dirty Over Catfish*, INT'L HERALD TRIBUNE, Jul. 23,

prosperity. While import restriction of catfish impoverishes a large number of poor Mekong River catfish farmers, import restriction of shrimp is much more serious, considering that shrimp is Vietnam's third largest export after crude oil and textiles.¹⁵⁵

Yet, what may be most damaging to U.S. relations with Vietnam are the latter's perceptions of a "hypocrisy" or "double standard" in the recent U.S. trade policies targeting Vietnamese seafood exports. First, it was the United States that initially spotlighted Vietnam's comparative advantage in aquaculture and thus advised Vietnam to invest in it.¹⁵⁶ Moreover, when domestic anxieties brewed in Vietnam over potential negative effects that the U.S.-Vietnam Bilateral Trade Agreement might bring, the United States strongly urged Vietnam to overcome parochial protectionism and pursue bold trade liberalization.¹⁵⁷ In fact, many Vietnamese conservatives within the Vietnamese Communist Party (VCP) leadership were originally opposed to the trade deal with the United States for fear that social instability, such as unemployment, could be caused by heightened competition from abroad.¹⁵⁸ It was this hesitation that delayed the final deal.¹⁵⁹ Hitting expanding Vietnamese industries with heavy antidumping duties while "the ink was not yet dry on that agreement"¹⁶⁰ would certainly vindicate Vietnamese conservatives and frustrate proponents who believed that the trade deal would "nudge Vietnam toward a more democratic society by committing the government to enact market-oriented reforms."¹⁶¹ One Vietnamese businessman remarked bitterly that, "our nation has a heavy history, and we try to forget it, try something new based on a spirit of cooperation and free trade, but now we are made to wonder whether you wish us ill, as much in the present as you did in the past."¹⁶²

This crisis in foreign relations transcends the realm of bilateral relations. First, as discussed above, blatant protectionism like the current catfish labeling scheme not only tarnishes U.S. credibility as a free trade advocate but also weakens the force of U.S. arguments against similar violations committed by other WTO Members, as was witnessed in the United States' lukewarm engagement in attacking the E.U.'s sardines

2003, available at <http://www.iht.com/articles/103673.html> (reporting that about a half-million Vietnamese are "living off the catfish trade").

¹⁵⁵ Sengupta, *supra* note 16.

¹⁵⁶ See *Harvesting Poverty*, *supra* note 3.

¹⁵⁷ McCain, *supra* note 8.

¹⁵⁸ See Manyin, *Bilateral Trade Agreement*, *supra* note 16, at 18-19.

¹⁵⁹ *Id.*

¹⁶⁰ McCain, *supra* note 8.

¹⁶¹ *Id.* at 7.

¹⁶² See *Harvesting Poverty*, *supra* note 3 (quoting Nguyen Huu Dung, the General Secretary of the Vietnam Association of Seafood Exporters).

labeling scheme which mirrored the catfish labeling scheme.¹⁶³ Second, the United States' continuing reliance on antidumping measures is highly communicable and tends to encourage reciprocal or defensive reactions from other trading partners, which may be termed a negative learning effect.¹⁶⁴ What if China follows the footsteps of the United States and misuses, overuses or abuses antidumping measures to address the "cushioning" concerns it is now facing in connection with WTO accession? The ghost of the suicidal pre-war era mercantilist race still haunts the global trading community.

Third, the aforementioned hypocrisy or double standard eclipses the constructive message that free trade carries. Instead, people in developing countries receive the following destructive message reminiscent of imperialism or colonialism: you may serve as an export market for our domestic products but not vice versa. In particular, the United States' trade policies toward NMEs like Vietnam are highly contradictory. If the United States continues to penalize exports from NMEs by imposing stricter antidumping conditions, it will be tantamount to saying that such nations must suffer until they become market economies, which will make it all the more difficult for them to achieve that status. Moreover, the U.S. double-standard policy may also send a negative message to would-be WTO Members, such as Russia,¹⁶⁵ who are now negotiating their accessions with the United States and the WTO. In particular, widespread frustrations and disappointments over the U.S. protectionist attacks launched immediately after the signing of the U.S.-Vietnam BTA may be used as ammunition by domestic opponents who suspects that power, not rules, would still prevail within the WTO.¹⁶⁶ This negative empirical confirmation also tends to chip away at positions held by proponents who preach long-term benefits which the WTO membership may bring to Russia.¹⁶⁷ This dark scenario becomes darker considering the fact that the Russian steel is now subject to, and continues to be vulnerable to, U.S. antidumping measures.¹⁶⁸

Finally, Hanoi's indignation over the recent trade skirmishes with the

¹⁶³ See *supra* § II.A.

¹⁶⁴ See Inge Nora Neufeld, *Antidumping and Countervailing Procedures – Use or Abuse?: Implications for Developing Countries* iii (2001); Policy Issues in International Trade and Commodities Study Series No. 9, UNCTAD/ITCD/TAB/10, at 3-4.

¹⁶⁵ See generally WTO Accessions: Russian Federation, available at http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm (last visited Nov. 25, 2004).

¹⁶⁶ *Russia Knocking on the WTO Door*, PRAVDA, May 18, 2004, available at <http://newsfromrussia.com/main/2004/05/18/53974.html> (last visited Nov. 25, 2004).

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., U.S. CUSTOMS AND BORDER PROTECTION, CDSOA – AMOUNT AVAILABLE FOR DISBURSEMENT BY CASE AND CLAIMANT 104 (Case: A-821-809 Hot-Rolled Carbon Steel Flat Products / Russia), available at http://www.cbp.gov/linkhandler/cgov/import/add_cvd/cont_dump/cdsoa_03/cdsoa03_section1.ctt/cdsoa03section1.pdf (last visited Nov. 25, 2004).

United States tends to make the U.S. foreign affairs cost in this case be far higher when this China factor is viewed against a broader backdrop. Vietnam has managed its delicate geo-political situation by balancing its foreign relations with China and the United States. By normalizing its relations with the United States, Vietnam had to embrace an anxious China, which had discouraged Hanoi from striking a trade deal with Washington before China did in 1999.¹⁶⁹ Yet, recent developments tend to distance Vietnam from the United States and steer it closer to China. Notably, China has taken advantage of the “disillusionment” of some Asian economies about the “pace and tone” of the Clinton Administration’s free trade policies in enhancing its influence in Asia,¹⁷⁰ which has contributed to the recent establishment of a new coalition of the “ASEAN plus 3 (China, Korea, and Japan).”¹⁷¹ In this vein, Kavi Chongkittavorn aptly commented that, “China hasn’t replaced the U.S. But it’s eating away at America’s influence. This is going to keep happening unless Washington changes its ways.”¹⁷²

V. REMEDYING THE CATASTROPHE: FIDELITY TO OPENNESS

A. Openness in the National Sphere

“All politics is local,”¹⁷³ and the politics associated with international trade are no exception. As Robert Putnam aptly described in his “two-level games” model,¹⁷⁴ a subtle interface between “international commitment” and “domestic endorsement” tends to control the final outcome of any foreign policy. The problem, as public choice scholars argue,¹⁷⁵ lies in the fact that domestic endorsement is often hijacked and usurped by a narrow scope of powerful, well-orchestrated lobbying groups with little input from the broader public. Accordingly, in molding public policies, the welfare of a few is often prioritized over the welfare of the many. In fact, this strong local bias toward protectionism is built in structurally, at least in trade

¹⁶⁹ See Manyin, *Bilateral Trade Agreement*, *supra* note 16, at 19.

¹⁷⁰ Carlyle A. Thayer, *ASEAN Ten Plus Three: An Evolving East Asian Community?*, 2 COMP. CONNECTIONS: AN E-JOURNAL ON E. ASIAN BILATERAL REL. 52 (2001), <http://www.csis.org/pacfor/cc/004Q.pdf>.

¹⁷¹ See generally U.S.-ASEAN Business Council, *ASEAN + 3 (China, Japan, and South Korea)*, available at <http://www.us-asean.org/ASEANOverview/asean+3.asp> (last visited Nov. 25, 2004).

¹⁷² Thayer, *supra* note 170.

¹⁷³ See generally TIP O’NEILL, ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME (1994).

¹⁷⁴ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

¹⁷⁵ See Felkins, *supra* note 1; BUCHANAN & TULLOCK, *supra* note 1.

policies. Certain arcane trade statutes still wield a powerful “institutional heritage” which has been established by the Congress and is captured, not surprisingly, by fragmented local constituencies that routinely engage in costly and wasteful “horse-trading.”¹⁷⁶ Occasionally, the Executive attempts to overcome this institutional heritage without success.¹⁷⁷ Ultimately, the competition between international commitment and domestic endorsement often results in the schizophrenic and unstable co-existence of free trade and local protectionism.¹⁷⁸

The best way to redress this constitutional failure is to return to a classical vehicle of democracy: open debates for public awareness. Certainly, initial challenges to protectionism will be led primarily by interested constituencies. In a move to balance the political ledger, the “Consuming Industries Trade Action Coalition (CITAC)” joined the “American Seafood Distributors Association (ASDA)” to create the “Shrimp Task Force.”¹⁷⁹ This alliance of grocers, restaurants, processors, distributors and other businesses organizations¹⁸⁰ aims to raise awareness of hard facts so that policymakers, media, and the public will be better informed regarding the devastating effects of parochial protectionism. As Anne Krueger has observed, “if citizens could easily identify and directly vote on the magnitudes of gains and losses from protection,” the U.S. trade policies would be different from what they are now.¹⁸¹ If properly channeled toward local representatives, a well-informed *vox populi* can thwart protectionist trade policies. Recently, thirteen Members of Congress wrote to the U.S. Secretary of Commerce Donald Evans to warn against the protectionist abuse of discretion exercised by the DOC in the recent antidumping cases on the shrimp imports, emphasizing that the import

¹⁷⁶ See JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY 184-85 (1993); PATRICK LOW, TRADING FREE: THE GATT AND US TRADE POLICY 130-32 (1993).

¹⁷⁷ *Id.* at 236. For instance, the 1988 amendment of Section 301 severely constrained the Administration by establishing “mandatory” retaliation as well as making procedures stricter. Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT’L ECON. L. 233, 244-48 (1996). See also Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM: AMERICA’S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 118 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (contending that the Executive was “handcuffed” by tighter rules created by these amendments of Section 301); Julia C. Bliss, *The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response*, 20 LAW & POL’Y INT’L BUS. 501, 502 (1989) (portraying the 1988 amendment of Section 301 as a move “from a diplomatic, flexible means of solving market access problems to a more rigid, procedural trade remedy statute.”).

¹⁷⁸ ANNE O. KRUEGER, AMERICAN TRADE POL’Y: A TRAGEDY IN THE MAKING 30 (1995).

¹⁷⁹ CITAC, *supra* note 138.

¹⁸⁰ Shrimp Task Force, *Which Companies Are Members of the Task Force?*, at <http://www.citac.info/shrimp/about/membership.htm> (last visited Nov. 26, 2004).

¹⁸¹ KRUEGER, *supra* note 178, at 3.

restrictions would threaten thousands of American jobs in derivative industries connected to shrimp imports.¹⁸² If members of the U.S. public were to adopt a more proactive stance against parochial protectionism along these lines, pursuit of the general welfare would stand a much better chance of prevailing over local politics.

Furthermore, certain policies could be introduced to facilitate this democratic process in and out of the government structure. First of all, antidumping statutes may be amended to require the DOC to conduct a “mandatory inter-agency consultation” before the imposition of final antidumping duties. Unlike the DOC, which is vulnerable to capture by domestic producers, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) tend to advocate the general values of market competition and consumer welfare. The former FTC Chairman Daniel Oliver, after highlighting the devastating effects of protectionism to consumers and to competition itself,¹⁸³ has stated that the FTC’s role in international trade is to speak for consumers and the competitive process.¹⁸⁴ In this context, if either the FTC or the DOJ were given a role in the antidumping procedure, it could effectively counteract the protectionist bias embedded in the structure and operation of the antidumping statute.

In a similar vein, the antidumping statute should be amended to include a “public interest clause,” as is required in certain other jurisdictions.¹⁸⁵ This clause would function as a safety valve to deter situations in which the interests of a small group of producers are allowed to prevail over the general welfare of consumers and the U.S. economy as a whole. Furthermore, introducing a mandatory public hearing, which is required in the case of safeguard measures,¹⁸⁶ prior to any final antidumping determination by the DOC would secure an effective opportunity for public attention and intervention.¹⁸⁷ This procedural innovation would constitute a

¹⁸² Letter from Pete Sessions et al., United States Congress, to Donald Evans, Secretary of Commerce (May 7, 2004).

¹⁸³ Press Release, Federal Trade Commission, FTC Chairman Oliver Says Protectionism is Special Interest Legislation (May 17, 1988), at <http://www.ftc.gov/opa/predawn/F88/oliveraiac.txt> (analogizing protectionism as an effective *cartel* arrangement enforced by the government and highlighting that the cost of protectionism fall disproportionately upon low income workers).

¹⁸⁴ Press Release, Federal Trade Commission (FTC), Federal Trade Commission’s Role in International Trade is to Protect Consumers through Competition, at <http://www.ftc.gov/opa/predawn/F86/fordham.htm> (Oct. 16, 1986).

¹⁸⁵ See generally Marc Wellhausen, *The Community Interest Test in Antidumping Proceedings of the European Union*, 16 AM. U. INT’L L. REV. 1027 (2001).

¹⁸⁶ See Dorinda G. Dallmeyer, *The United States – Japan Semiconductor Accord of 1986: The Shortcomings of High-Tech Protection*, 13 MD. J. INT’L L. & TRADE 179, 207 (1989); 19 U.S.C.A. § 2151(e) (“In preparing its advice to the President under this section, the Commission shall, after reasonable notice, hold public hearings.” (emphasis added)).

¹⁸⁷ Such mandatory public hearing within the DOC tends to provide a fertile ground for

great improvement over the current hearing system within the DOC, which is held mainly to give interested parties a chance to comment on case briefs or on previous comments submitted to the antidumping authority by other interested parties.¹⁸⁸

B. Openness in the International Sphere

In the arena of international commerce, a great many options, especially non-entropic options, are available to those who are willing to approach the problem with creativity and an open mind. First, the moribund Southern seafood farmers might consider investing in the Vietnamese catfish industries, which continue to prosper in the face of protectionist attacks.¹⁸⁹ If the natural endowments of the Mekong Delta were enhanced by Southern capital, greater wealth could be created on both sides. The Vietnamese catfish and shrimp produced under such a foreign direct investment (FDI) scheme would even find lucrative markets outside the United States through exports. Although the catfish and shrimp would be produced in Vietnam, Southern investors would be handsomely compensated.

From a different standpoint, workers from Vietnam or other developing countries could temporarily migrate to the South in order to provide cheap labor, which would boost the price competitiveness of Southern seafood. From an economic perspective, free movement of labor shares the same premise—efficiency—with the free movement of other factors of production, such as capital.¹⁹⁰ Adherence to this basic economic principle would serve the mutual benefit of home and recipient countries in the form of remittance of wages and lower labor costs, respectively.¹⁹¹

the consideration of the “public interest” in the final imposition of antidumping duties. See Lindsey & Ikenson, *supra* note 67, at 191-93.

¹⁸⁸ 19 U.S.C.A. § 1677(c) (1930).

¹⁸⁹ This possibility was discussed in a conference held at Harvard Law School in 2003. Karl Klare & Dan Danielsen, *Case Study: International Regimes and Local Politics: Labor, Catfish & Trade*, presented at Harvard Law School (Apr. 13, 2003).

¹⁹⁰ Considering the existence of large wage differentials on a global scale, mounting migration pressures seem quite natural. See PAUL COLLIER & DAVID DOLLAR, *GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY* 44-45 (2002) [hereinafter *GLOBALIZATION, GROWTH, AND POVERTY*]. See also *OECD Analysis Shows Trends Reflecting Economic Opportunities*, UN WIRE, at http://www.unwire.org/UNWire/20020103/22816_story.asp (Jan. 3, 2002).

¹⁹¹ According to a World Bank report, seven million legal as well as three million undocumented Mexican immigrant laborers contributed to the United States’ sustained growth with low inflation in the 1990’s. *GLOBALIZATION, GROWTH, AND POVERTY*, *supra* note 190, at 12. See also Dani Rodrik, *Globalization for Whom*, HARVARD MAGAZINE, Jul. - Aug. 2002, at 31 (observing that “even a small relaxation” of restrictive rules on cross-border labor movement will result in huge gains both for the world economy and for poor countries in particular); Jean-Pierre Garson, *Zero Immigration is Pure Fancy*, 225 OECD

Unfortunately, immigration often causes negative socio-political consequences, including the displacement of domestic workers, which make it politically controversial notwithstanding the fact that it would enhance the overall welfare of the recipient countries.

Despite the socio-political impact of the free movement of labor, the Uruguay Round attempted to address free movement of persons via the General Agreement on Trade in Services (GATS), under the title of "movement of natural persons."¹⁹² Yet, the political stakes, particularly in developed countries, did not allow much room for negotiation.¹⁹³ Although those developing countries with abundant cheap labor forces advocated a liberal scope for the movement of natural persons, they were unable to overcome the unified opposition of developed countries, which feared an influx of migrant workers. The end result was significantly restricted coverage of this issue under the GATS, which currently concerns only white-collar professionals.¹⁹⁴

In sum, current U.S. immigration policies leave very little room for the possibility of guest workers from Vietnam. Nevertheless, this proposal will remain relevant as long as business interests pursue economic incentives at the domestic level and as long as poor countries continue pushing for a more liberal policy at the international level.

VI. CONCLUSION: AMERICAN EXCEPTIONALISM

This Article, through the prism of Vietnamese seafood trade disputes, has explored the causes and effects of parochial protectionism in the United States, and suggested a number of options for overcoming such problems. Stated broadly, the conclusion is that the United States should exercise real leadership in the area of free trade instead of resorting to self-defeating and hypocritical exceptionalism.

"American-style" politics,¹⁹⁵ which have recently been revealed in the series of attacks against the Vietnamese seafood exports, provide yet

OBSERVER 27-28 (2001).

¹⁹² WTO Agreement, *supra* note 13, General Agreement on Trade in Services, Annex 1 B, Annex on Movement of Natural Persons Supplying Services under the Agreement. See also Kevin C. Kennedy, *The GATT – WTO System at Fifty*, 16 WIS. INT'L L.J. 421, 492-93 (1998).

¹⁹³ This also explains why immigration is highly restricted in general by OECD countries. GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 190, at 11.

¹⁹⁴ See, e.g., *The United States of America – Schedule of Specific Commitments*, GATS/SC/90 (Apr. 15, 1994) (in particular, "Horizontal Commitments," item 4), available at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (last visited Nov. 26, 2004). This trend, which favors an immigration of well-educated, professional people from the developing countries, is called a "brain drain." GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 190, at 79.

¹⁹⁵ Becker, *supra* note 6 (quoting Frederick Z. Brown).

another empirical confirmation on a broader theme of "American Exceptionalism"¹⁹⁶ in trade policy, along with the recent "Steel Initiative"¹⁹⁷ and the gigantic \$180 billion "Farm Bill,"¹⁹⁸ which was signed in 2002 to lavishly subsidize domestic farmers for years to come. These blatant deviations from trade rules, which may collectively be interpreted as "de-multilateralization," tend to ridicule and undermine the integrity of the multilateral trading system. While international trade law may metaphorically be portrayed as the ropes that fasten vulnerable Odysseus to the mast of multilateralism against the tempting Sirens of protectionism,¹⁹⁹ only the *American* Odysseus might freely untie its ropes and join the Sirens whenever it feels inclined to. No matter what this Exceptionalism may be attributable to, be it the U.S. governance structure²⁰⁰ or its "institutional heritage,"²⁰¹ it is obviously damaging both to the United States and to the rest of the world. Although the United States undeniably enjoys unparalleled power in the contemporary world, it cannot afford to abuse its exceptional power when taking into account the enormous reputation cost²⁰²

¹⁹⁶ Regarding a more general theme of American Exceptionalism, see SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996); DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* (1998).

¹⁹⁷ Press Release, The White House, Statement by the President Regarding a Multilateral Initiative on Steel, at <http://www.whitehouse.gov/news/releases/2001/06/20010605-4.html> (June 5, 2001).

¹⁹⁸ Press Release, The White House, President Signs Farm Bill, at <http://www.whitehouse.gov/news/releases/2002/05/20020513-2.html> (May 13, 2002) (last visited on Nov. 26, 2004).

¹⁹⁹ See Robert E. Hudec, *GATT or GABB?: The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1309-36 (1971) (discussing the policy of "lashing oneself to the mast").

²⁰⁰ See ROBERT L. PAARLBERG, *LEADERSHIP ABROAD BEGINS AT HOME: US FOREIGN ECONOMIC POLICY AFTER THE COLD WAR* 32-53 (1995) (introducing a list of seven "enduring and distinctive" features of the U.S. political system that have undermined its external leadership: "divided government," "congressional power over trade," "disunity and discontinuity in the executive," "transparency of policymaking," "legalism in policymaking," "federalism," and "an insular popular culture"). See also STEPHEN D. COHEN ET AL., *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY: ECONOMICS, POLITICS, LAWS AND ISSUES* 105-08 (1996) (highlighting the "extraordinary degree" of decentralization in the U.S. government); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 28 (2d ed. 1996) (regarding the "web of authority [Framers] created, from fear of too much government"); RAYMOND VERNON ET AL., *IRON TRIANGLES AND REVOLVING DOORS: CASES IN U.S. FOREIGN ECONOMIC POLICYMAKING* 4 (1991) (viewing decentralization as a defining feature of the U.S. foreign trade policy).

²⁰¹ See GOLDSTEIN, *supra* note 176, at 184-85 (1993) (describing protectionism as an embedded "institutional heritage," which creates unpredictable outcomes on specific occasions).

²⁰² Cf. Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 286 (1996); William P. Alford, *Taiwan and the GATT Intellectual Property, Trade and Taiwan*:

and the loss of so-called “soft power.”²⁰³

To overcome Exceptionalism, the United States needs to play a greater leadership role in the world by re-defining its narrow national interest to accommodate a much broader range of global interests,²⁰⁴ including those of Vietnamese catfish and shrimp exporters. The “porousness” of the U.S. democracy²⁰⁵ has great potential to facilitate more open and candid deliberation and debate on U.S. trade policies. Greater openness in the domestic trade policy-making process would tend to produce a more balanced and coherent position, which would be more open to and accommodative of the multilateral trading system and the principle of free trade. The reduction of protectionism by means of these constructive innovations would constitute a dual success of domestic and foreign policy. Only under such circumstances will the United States be able to fulfill its proper leadership role in the world. Such leadership will truly be *exceptional*.

A GATT-Fly's View, 1992 COLUM. BUS. L. REV. 97, 98-99 (1992) (warning that such exceptionalism might be translated into economic imperialism).

²⁰³ JOSEPH S. NYE JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 162 (2002).

²⁰⁴ *Id.* at 138.

²⁰⁵ Stephen D. Krasner, *Power and Constraint*, 1 CHI. J. INT'L L. 231, 236 (2000).

